

EXHIBIT B

- 1 -

1
2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 05-44481 (RDD); Adv. Proc. No. 07-02619 (RDD);

5 Adv. Proc. No. 07-02242 (RDD); Adv. Proc. No. 07-02256 (RDD);

6 Adv. Proc. No. 07-02333 (RDD); Adv. Proc. No. 07-02580 (RDD);

7 Adv. Proc. No. 07-02661 (RDD); Adv. Proc. No. 07-02743 (RDD);

8 Adv. Proc. No. 07-02768 (RDD); Adv. Proc. No. 07-02769 (RDD);

9 Adv. Proc. No. 07-02790 (RDD); Adv. Proc. No. 07-02076 (RDD);

10 Adv. Proc. No. 07-02084 (RDD); Adv. Proc. No. 07-02096 (RDD);

11 Adv. Proc. No. 07-02125 (RDD); Adv. Proc. No. 07-02177 (RDD);

12 Adv. Proc. No. 07-02188 (RDD); Adv. Proc. No. 07-02211 (RDD);

13 Adv. Proc. No. 07-02212 (RDD); Adv. Proc. No. 07-02236 (RDD);

14 Adv. Proc. No. 07-02250 (RDD); Adv. Proc. No. 07-02262 (RDD);

15 Adv. Proc. No. 07-02270 (RDD); Adv. Proc. No. 07-02291 (RDD);

16 Adv. Proc. No. 07-02328 (RDD); Adv. Proc. No. 07-02337 (RDD);

17 Adv. Proc. No. 07-02348 (RDD); Adv. Proc. No. 07-02432 (RDD);

18 Adv. Proc. No. 07-02436 (RDD); Adv. Proc. No. 07-02449 (RDD);

19 Adv. Proc. No. 07-02479 (RDD); Adv. Proc. No. 07-02525 (RDD);

20 Adv. Proc. No. 07-02534 (RDD); Adv. Proc. No. 07-02539 (RDD);

21 Adv. Proc. No. 07-02551 (RDD); Adv. Proc. No. 07-02581 (RDD);

22 Adv. Proc. No. 07-02597 (RDD); Adv. Proc. No. 07-02618 (RDD);

23 Adv. Proc. No. 07-02623 (RDD); Adv. Proc. No. 07-02659 (RDD);

24 Adv. Proc. No. 07-02672 (RDD); Adv. Proc. No. 07-02702 (RDD);

25 Adv. Proc. No. 07-02723 (RDD); Adv. Proc. No. 07-02743 (RDD);

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1 Adv. Proc. No. 07-02744 (RDD); Adv. Proc. No. 07-02750 (RDD);
2 Adv. Proc. No. 07-02188 (RDD)
3 - - - - -x
4 In the Matter of:
5 DPH HOLDINGS CORP., et al.,
6 Reorganized Debtors.
7 - - - - -x
8 DELPHI CORPORATION, et al.,
9 Plaintiffs,
10 -against-
11 SETECH INC., et al.,
12 Defendants.
13 - - - - -x
14 DELPHI CORPORATION, et al.,
15 Plaintiffs,
16 -against-
17 DUPONT COMPANY, et al.,
18 Defendants.
19 - - - - -x
20 DELPHI CORPORATION, et al.,
21 Plaintiffs,
22 -against-
23 ECO-BAT AMERICA LLC,
24 Defendant.
25 - - - - -x

- 3 -

1 - - - - -x
2 DELPHI CORPORATION, et al.,
3 Plaintiffs,
4 -against-
5 GLOBE MOTORS INC.,
6 Defendant.
7 - - - - -x
8 DELPHI CORPORATION, et al.,
9 Plaintiffs,
10 -against-
11 PHILIPS SEMICONDUCTOR, et al.,
12 Defendants.
13 - - - - -x
14 DELPHI CORPORATION, et al.,
15 Plaintiffs,
16 -against-
17 SUMMIT POLYMERS INC.,
18 Defendant.
19 - - - - -x
20 DELPHI CORPORATION, et al.,
21 Plaintiffs,
22 -against-
23 M & Q PLASTIC PRODUCTS, et al.,
24 Defendants.
25 - - - - -x

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1 - - - - -x
2 DELPHI CORPORATION, et al.,
3 Plaintiffs,
4 -against-
5 RSR CORPORATION, et al.,
6 Defendants.
7 - - - - -x
8 DELPHI CORPORATION, et al.,
9 Plaintiffs,
10 -against-
11 RSR/ECOBAT,
12 Defendant.
13 - - - - -x
14 DELPHI CORPORATION, et al.,
15 Plaintiffs,
16 -against-
17 TYCO et al.,
18 Defendants.
19 - - - - -x
20 DELPHI CORPORATION, et al.,
21 Plaintiffs,
22 -against-
23 AHAUS TOOL & ENGINEERING INC.,
24 Defendant.
25 - - - - -x

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1 - - - - -x
2 DELPHI CORPORATION, et al.,
3 Plaintiffs,
4 -against-
5 A 1 SPECIALIZED SVC & SUPP., INC.,
6 Defendant.
7 - - - - -x
8 DELPHI CORPORATION, et al.,
9 Plaintiffs,
10 -against-
11 A-1 SPECIALIZED SERVICES,
12 Defendant.
13 - - - - -x
14 DELPHI CORPORATION, et al.,
15 Plaintiffs,
16 -against-
17 ATS AUTOMATION TOOLING SYSTEMS INC., et al.,
18 Defendants.
19 - - - - -x
20 DELPHI CORPORATION, et al.,
21 Plaintiffs,
22 -against-
23 CORNING INC., et al.,
24 Defendants.
25 - - - - -x

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1 - - - - -x
2 DELPHI CORPORATION, et al.,
3 Plaintiffs,
4 -against-
5 CRITECH RESEARCH INC.,
6 Defendant.
7 - - - - -x
8 DELPHI CORPORATION, et al.,
9 Plaintiffs,
10 -against-
11 DOSHI PRETTL INTERNATIONAL, et al.,
12 Defendants.
13 - - - - -x
14 DELPHI CORPORATION, et al.,
15 Plaintiffs,
16 -against-
17 D & R TECHNOLOGY LLC, et al.,
18 Defendants.
19 - - - - -x
20 DELPHI CORPORATION, et al.,
21 Plaintiffs,
22 -against-
23 DSSI, et al.,
24 Defendants.
25 - - - - -x

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1 - - - - -x
2 DELPHI CORPORATION, et al.,
3 Plaintiffs,
4 -against-
5 DANOBAT MACHINE TOOL CO. INC.,
6 Defendant.
7 - - - - -x
8 DELPHI CORPORATION, et al.,
9 Plaintiffs,
10 -against-
11 EDS, et al.,
12 Defendants.
13 - - - - -x
14 DELPHI CORPORATION, et al.,
15 Plaintiffs,
16 -against-
17 BP, et al.,
18 Defendants.
19 - - - - -x
20 DELPHI CORPORATION, et al.,
21 Plaintiffs,
22 -against-
23 CARLISLE, et al.,
24 Defendants.
25 - - - - -x

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1 - - - - -x
2 DELPHI CORPORATION, et al.,
3 Plaintiffs,
4 -against-
5 GKNS INTERMETALS,
6 Defendant.
7 - - - - -x
8 DELPHI CORPORATION, et al.,
9 Plaintiffs,
10 -against-
11 EX-CELL-O MACHINE TOOLS INC.,
12 Defendant.
13 - - - - -x
14 DELPHI CORPORATION, et al.,
15 Plaintiffs,
16 -against-
17 JOHNSON CONTROLS, et al.,
18 Defendants.
19 - - - - -x
20 DELPHI CORPORATION, et al.,
21 Plaintiffs,
22 -against-
23 NILES USA INC., et al.,
24 Defendants.
25 - - - - -x

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1 - - - - -x
2 DELPHI CORPORATION, et al.,
3 Plaintiffs,
4 -against-
5 METHODE ELECTRONICS INC., et al.,
6 Defendants.
7 - - - - -x
8 DELPHI CORPORATION, et al.,
9 Plaintiffs,
10 -against-
11 MICROCHIP,
12 Defendant.
13 - - - - -x
14 DELPHI CORPORATION, et al.,
15 Plaintiffs,
16 -against-
17 HEWLETT PACKARD, et al.,
18 Defendants.
19 - - - - -x
20 DELPHI CORPORATION, et al.,
21 Plaintiffs,
22 -against-
23 OLIN CORP,
24 Defendant.
25 - - - - -x

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1 - - - - -x
2 DELPHI CORPORATION, et al.,
3 Plaintiffs,
4 -against-
5 INTEC GROUP,
6 Defendant.
7 - - - - -x
8 DELPHI CORPORATION, et al.,
9 Plaintiffs,
10 -against-
11 VALEO, et al.,
12 Defendants.
13 - - - - -x
14 DELPHI CORPORATION, et al.,
15 Plaintiffs,
16 -against-
17 VANGUARD DISTRIBUTORS,
18 Defendant.
19 - - - - -x
20 DELPHI CORPORATION, et al.,
21 Plaintiffs,
22 -against-
23 VICTORY PACKAGING, et al.,
24 Defendants.
25 - - - - -x

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1 - - - - -x
2 DELPHI CORPORATION, et al.,
3 Plaintiffs,
4 -against-
5 WAGNER-SMITH COMPANY,
6 Defendant.
7 - - - - -x
8 DELPHI CORPORATION, et al.,
9 Plaintiffs,
10 -against-
11 WELLS FARGO BUSINESS, et al.,
12 Defendants.
13 - - - - -x
14 DELPHI CORPORATION, et al.,
15 Plaintiffs,
16 -against-
17 SELECT TOOL & DIE CORP.,
18 Defendant.
19 - - - - -x
20 DELPHI CORPORATION, et al.,
21 Plaintiffs,
22 -against-
23 SHUERT INDUSTRIES INC.,
24 Defendant.
25 - - - - -x

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1 - - - - -x
2 DELPHI CORPORATION, et al.,
3 Plaintiffs,
4 -against-
5 SUMITOMO, et al.,
6 Defendants.
7 - - - - -x
8 DELPHI CORPORATION, et al.,
9 Plaintiffs,
10 -against-
11 TECH CENTRAL,
12 Defendant.
13 - - - - -x
14 DELPHI CORPORATION, et al.,
15 Plaintiffs,
16 -against-
17 PRUDENTIAL RELOCATION, et al.,
18 Defendants.
19 - - - - -x
20 DELPHI CORPORATION, et al.,
21 Plaintiffs,
22 -against-
23 LDI INCORPORATED,
24 Defendant.
25 - - - - -x

- 13 -

1 - - - - -x
2 DELPHI CORPORATION, et al.,
3 Plaintiffs,
4 -against-
5 M & Q PLASTIC PRODUCTS, et al.,
6 Defendants.
7 - - - - -x
8 DELPHI CORPORATION, et al.,
9 Plaintiffs,
10 -against-
11 REPUBLIC ENGINEERED PRODUCTS, et al.,
12 Defendants.
13 - - - - -x
14 DELPHI CORPORATION, et al.,
15 Plaintiffs,
16 -against-
17 RIECK GROUP LLC,
18 Defendant.
19 - - - - -x
20 DELPHI CORPORATION, et al.,
21 Plaintiffs,
22 -against-
23 CRITECH RESEARCH INC.,
24 Defendant.
25 - - - - -x

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U.S. Bankruptcy Court
300 Quarropas Street
White Plains, New York

July 22, 2010

10:20 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

1 this point, but to me the Constitutional issue, you know, the
2 due-process issue here, is not so much the running of time as
3 the issue of whether and how the defendants got notice of the
4 Rule 4 motions. If they didn't get notice, then it's wide
5 open. If they did get notice, I think there's a 60(b) hurdle.
6 But if they didn't get notice, it's wide open and I should look
7 at it as whether, you know, it was appropriate to have entered
8 those orders. And they should have all their -- you know,
9 their right to say they shouldn't have been entered.

10 MS. SCHWEITZER: Right. Your Honor, I think Your
11 Honor -- as you're raising, there are very difficult questions
12 raised when you look at both sides of this argument. You
13 raised several points and I'd like to take some of them in
14 turn. The first one is just the raising of the 4(m) and the
15 fact the Supreme Court has said that there's no per se due-
16 process violation in terms of changing a statute of
17 limitations. That's said in the context of policy decisions of
18 policymakers making a uniform decision that 'We're going to
19 change the rule. We're going to change the law because BP has
20 now intoxicated the entire Gulf of Mexico and we need to say
21 it's not fair that people have a year to bring those claims.'
22 There's been no grand policy decisions here.

23 And in fact the debtors didn't need more time to bring
24 the claims. The debtors said 'I'll file these claims in a
25 timely manner.'

1 THE COURT: But, I mean, a policy could be un-
2 Constitutional too. I mean, Congress may say that we want to,
3 you know -- well --

4 MS. SCHWEITZER: Right.

5 THE COURT: -- that 'We decide as a policy matter to
6 legalize slavery. You know, that clearly violate the due-
7 process clause. It's a policy decision, but --

8 MS. SCHWEITZER: Right.

9 THE COURT: So I don't --

10 MS. SCHWEITZER: But --

11 THE COURT: I mean, I think the point is that the
12 statute of limitations, I don't believe, is the type of
13 interest that's protected by due process.

14 MS. SCHWEITZER: But I think that there's two
15 different things that happen here to the debtors is that they
16 claim that they satisfied the statute of limitations. They
17 said 'We filed these timely,' right? And 'We met the two and a
18 half year deadline.'

19 THE COURT: Right.

20 MS. SCHWEITZER: 'But what we want to do after that
21 point is put these in a drawer, put them under lock and seal
22 and affirmatively not tell people about these claims' in two
23 different ways: in filing these extension motions without
24 particularized notice, and I'll get to that; and the second way
25 is affirmatively sealing not only the complaint, which we now

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1 know contains no confidential information, no commercial reason
2 that you need to sell this complain other than to let someone
3 know it doesn't exist.

4 THE COURT: Right.

5 MS. SCHWEITZER: And they not only sealed that, but
6 they actually sealed the docket itself so that any diligent
7 counterparty who regularly searches the federal docket to find
8 out if they've been sued and whether it's because they're
9 selling their company or because they want to take reserves or
10 because they want to do whatever they do in the ordinary
11 course, could not find this docket.

12 And the debtors' explanation for that is they want to
13 preserve business relationships with folks, folks I assume like
14 HP who has continued to do business with them.

15 THE COURT: I understand, but to me that all goes to
16 laches. I mean, it just -- it strikes me that tomorrow
17 Congress could say that for debtors-in-possession the two-year
18 period is a six-year period. And there's nothing that you all
19 could do about that.

20 MS. SCHWEITZER: But the fact --

21 THE COURT: I mean, you could vote out your
22 congressmen, but that would be it.

23 MS. SCHWEITZER: Right, and -- fair enough, but I
24 think that the answer there is that if you -- that these
25 arguments definitely do bleed into each other. And whether you

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1 want to say it's per se laches, which you can, again, decide on
2 a motion to dismiss, that there are facts that are common to
3 people, right? That the complaints themselves were hidden from
4 everyone for two and a half years.

5 Rule 4(m) is an extension of time to serve people, not
6 to not serve people. They asked for permission not to serve
7 people. And what they said in their original motions, which is
8 probably different than how it played out, was, 'We want to
9 preserve business relationships. We want to work with
10 people --

11 THE COURT: No, I understand that point and it seems
12 to me it may make more sense to move from, sort of, the basic
13 due process argument that you started out with to the point
14 that the order shouldn't have been entered in the first place
15 and can be looked at, you know, on a blank slate for those who
16 didn't get notice of them.

17 MS. SCHWEITZER: Right. Well, I think that -- so
18 let's take the notice argument, because I know that is another
19 thing you raised and it's a fair point. There are certain
20 defendants in the room such as Mr. Gottfried whose clients were
21 not creditors of the estate at all. They didn't appear; they
22 weren't creditors; they closed their books; they weren't on
23 notice of the motion. I think that's the most extreme version
24 of 'I, A, didn't know there was a claim against me, I didn't
25 even know I had to hire a lawyer to monitor this bankruptcy

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1 case and I certainly was never told of the extension of
2 times' --

3 THE COURT: Right.

4 MS. SCHWEITZER: -- 'so I didn't have an opportunity
5 to contest that.' I, quite frankly, think that's the slam
6 dunk, right? Because you look at that and you say --

7 THE COURT: Well, it's a slam dunk as far as looking
8 at the order as brand new. I don't think it necessarily means
9 that the orders aren't effective as to that person; it just
10 means that that person can raise whatever issue they want as to
11 that order -- as to those orders.

12 MS. SCHWEITZER: Right. And I would happily go into
13 the arguments as looking as the orders as brand new, but I do
14 want to be respectful of not dupli --

15 THE COURT: I'm sorry. The arguments of?

16 MS. SCHWEITZER: Of looking at each of these orders
17 brand new and how they played out --

18 THE COURT: Okay.

19 MS. SCHWEITZER: I do want to be respectful of the
20 fact that Mr. Winsten was going to address --

21 THE COURT: All right.

22 MS. SCHWEITZER: -- those arguments, so --

23 THE COURT: Okay.

24 MS. SCHWEITZER: -- I won't step on that point.

25 THE COURT: That's fine.

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1 MS. SCHWEITZER: But I do want to address even the
2 idea of people who had, what the debtors would say of notice,
3 of the arguments because they were on a Rule 2002 service list
4 or the like of that.

5 THE COURT: Right.

6 MS. SCHWEITZER: What the debtors are saying is that
7 'We recognize that it's our duty to file and serve complaints.
8 We want to put these complaints under seal. We want all this
9 motion, which is not only an extension motion; this motion says
10 we started out with 11,000 claims and we crossed out a whole
11 bunch of these claims. We abandoned a whole bunch of other
12 claims. We're concerned with protecting debtor relationships
13 and we intend to not sue most of these people under this
14 existing plan or any other plan, modified, that we file in the
15 future. We generally do not want to preserve these claims.
16 But, we're moving quickly. We know that we don't have the time
17 to think this through. Allow us to put this placeholder in the
18 docket now and to go over time and figure out if we want these
19 claims to be pursued.'

20 And I will point, again, to the foreign defendants,
21 that if you're a foreign defendant as some of the HP and EDS
22 clients were, who didn't even have contracts with the debtor,
23 but if you were and you were diligent enough, these -- that
24 'I'm curious and I want to look at this motion, even though it
25 didn't pertain to appear to me and they're waiving it against

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1 me', then what the debtor is saying was, 'Well, if you were
2 really curious, you would have called the debtor counsel and
3 asked'. And why one of the 100 or 700 out of 11,000 that are
4 being preserved in the debtors' discretion, 'even though I have
5 continuing business relationships with you, even though I'm a
6 foreign defendant, even though I think I have ordinary course
7 defenses and you say you're not preserving any of those claims
8 at all.'

9 And this idea -- I understand; I don't mean to make
10 light of receiving notice on the 2002 service list, but this
11 idea that there's not particularized notice, you're not telling
12 the 700 or 177 people, 'This order related to you' is not
13 frivolous. When you look at the time that these motions were
14 entered on the docket, the first motion was docket number
15 8,905. So if you were getting stuff in the mail along the way
16 as the creditors do in the case, that means -- let's say, half
17 of those are affidavits of service. Let's just cross out half
18 of them. This is probably the 4,500th pleading you've received
19 in the mail at that point. You're paying your attorney, what,
20 500 dollars an hour to review these pleadings, and let's say
21 they're spending a quarter of an hour reviewing each of these
22 pleadings.

23 At that point, you've asked your attorney to go
24 looking for ways the debtors could step on your rights, you've
25 spent 563,000 dollars just in monitoring the docket in a case

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1 where the debtors themselves could have just said, the same way
2 they do for claims objections, the same way they do for
3 extensions of time to assume and reject leases, the same way
4 they do for every other motion that faces deadlines, they serve
5 you individualized notice and it says, 'You are one of the
6 small bucket of people who are not the 11,000 that we're
7 abandoning. You're one of the 177 or the 762.'

8 The burden there was not so great on the debtors that
9 they should -- 'We should be forced to explain why we read the
10 motion, didn't understand it or didn't realize in the face of
11 it that it applied to me or didn't realize that the debtor
12 meant his when they said that, didn't realize that when they
13 said that they were protecting business relationships that
14 wasn't my business relationship with them.'

15 And what I think is especially --

16 THE COURT: Well -- I'm sorry; go ahead.

17 MS. SCHWEITZER: Okay. No, go ahead.

18 THE COURT: Well, I mean the -- it wasn't buried in a
19 motion, right? The title of the motion would have showed you
20 that there, you know, if you had a concern about a preference,
21 it would have alerted you to that, wouldn't it?

22 MS. SCHWEITZER: It would have told you that the
23 debtors -- well, the first -- let's -- I think there's two
24 different portions of the motions, right? There's the two --
25 first two motions; they're sixty-day extensions, right? And I

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1 don't want to say no harm, no foul, but it was understandable
2 and whether you want to say people looked at that, at that time
3 and said, 'I don't know, you know. Maybe this is all going to
4 go away, whatever. It doesn't seem so important. It's
5 probably not me.' Whatever people did or didn't say or they
6 didn't even read it -- who knows, right?

7 When you get to the third motion, docket entry, again,
8 13,361, so this is the seventh, eighth, ninth, hundredth,
9 thousandth pleading you've gotten in the mail and you see this
10 and you say, 'Okay, the debtors are saying of 11,000 people,
11 762 of them are the ones that I'm preserving actions against,
12 that, again, not today, but I want to work through.'

13 You would have to tell defendants that your job is to
14 call the debtor, to make the assumption that out of 11,000
15 claims, you're one of 762 people whose rights are possibly
16 being affected because the debtor might in the future, you
17 know, decided to prosecute that action against you, again, when
18 they're good and ready.

19 I think at the time that motion was entered, no one
20 necessarily saw that this was going to be another two and a
21 half year process, that the plan was going to change so
22 substantially, that this was going to evolve over time. And
23 certainly, it's just -- it seems inconsistent with the law of
24 when you start with the premise that the law says you must
25 preserve an action, you must file it against a person and you

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1 must serve it on them. And the debtors saying, 'Oh, we have to
2 seal these complaints. These are relationships that we want to
3 preserve.'

4 The debtors wouldn't have informally or formally
5 notified you the way that they do, quite frankly, in every
6 other case, which is the debtors panic; they get to a week
7 before, there's such --

8 THE COURT: Well, if it was just filed, people
9 wouldn't have checked either, right, because they -- I mean,
10 you argue that it's not particularized, it's just file on the
11 docket, it's not served on them.

12 MS. SCHWEITZER: But, that actually --

13 THE COURT: I'm just not sure how the sealing really
14 fits into that at this point.

15 MS. SCHWEITZER: I think the way the sealing fits in
16 is whether you want to take it in the context of the plan. I
17 mean the plan would be the most extreme version, but it's the
18 same as the other adversary proceedings. It's as if you said,
19 'Gee, I want to know if my rights are affected. I want to know
20 if I should really be one of these people who's calling the
21 debtor. I want to know if I should be concerned' --

22 THE COURT: It would be easier to check the docket --

23 MS. SCHWEITZER: it'd be --

24 THE COURT: -- than to call the debtor. Yeah, I agree
25 with that. You could just -- you could use the electronic

1 docket to see if there was an adversary proceeding filed. I
2 agree with that.

3 But let me ask. The Supreme Court this year talked
4 about notice for due process purposes in the Espinosa case.
5 And they said that actual notice of the plan was enough, even
6 though it was the plan that improperly dealt with the
7 nondischargeable student loan. That was -- it was enough to
8 take it out of 60(b)(4) and was, you know, was sufficient due
9 process. How is this different from that?

10 MS. SCHWEITZER: Well, what I think is different is
11 that the concern here is that you're taking a process and
12 taking literal procedures and turning on the head the
13 expectations of all parties involved in that process. What
14 you're saying is I'm going to file a plan on you, right, and
15 I've got my plan disclosure statement in the mail.

16 The exhibit is missing on retained actions. Thirteen
17 days before the objection deadline, I'm going to file a notice
18 of plan supplement on the docket that lists docket numbers, not
19 actual case names, docket numbers, and if you, when you get
20 served by mail in the thirteen days before the confirmation
21 deadline, go to look up that exhibit, you're going to find a
22 link again to 177 docket numbers out of 11,000 potential
23 claims. You're going to go to those links and you're going to
24 hit a roadblock.

25 And so in those last ten days, if you really do

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1 consider yourself on notice and you really did want to look
2 into this, you're running against the wall and you're running
3 against the wall to find out that the debtors have, in fact,
4 sued you two and a half years earlier.

5 Now, I understand there are things in bankruptcy that
6 are sometimes preferable notice, the best possible notice
7 versus minimally adequate notice, but the difference here is
8 the debtors didn't merely say, 'I want to tell -- give people
9 comfort that, look, I filed this against you, I don't really
10 mean it.' Or, 'I don't know if I mean it. Let's all sit
11 tight, let's all join the benefit of the breather and the
12 benefit of working through whether these are meritorious claims
13 and we can all do that together.' The debtors, instead,
14 unilaterally, at every turn, said, 'I'm not going to tell you.'
15 And the due process cases around planned disclosure and the res
16 judicata cases around planned disclosure generally say, 'Well,
17 if the debtor preserves everything, everyone knows they're
18 affected.' Right? Or if was just too burdensome for the
19 debtor that they couldn't really possibly have gone through and
20 sorted out the cases so early on in their proceeding, we're
21 going to give them a little slack.

22 But here the debtors knew exactly what they were
23 preserving. And they didn't serve that plan exhibit on anyone.
24 They didn't unseal the dockets at that point. They didn't even
25 ask for effective relief to seal the dockets in the context of

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1 the plan or to seal a schedule in the plan that would have
2 listed the peoples' names. What they said was, 'Oh, we already
3 got that relief a year and a half earlier and we're going to
4 get it again after the plan is confirmed because it worked so
5 well. Let's just keep doubling down', all on the principal of
6 'We're protecting ongoing business relationships.'

7 And to say to people that you, as the defendant, have
8 to be on the watch and you have to come forward when you think
9 something unjust is happening, really shifts the burden on you.
10 You're saying you don't just have a burden to defend against
11 claims; you have a burden to actively monitor dockets and
12 actively ferret out when the debtors are doing things contrary
13 to your expectations. Not just things that they would
14 ordinarily would be entitled to do, but when they're actually
15 burying claims and putting them to the back of the road, well
16 beyond the initial purpose which was just status quo and
17 nonprejudice. Now, you have to spend the time and money -- at
18 what point is a creditor allowed to tell their attorneys, 'Stop
19 spending money.'?

20 I mean, doing the same math they had given you, if you
21 look at the third extension that was after the plan, you get
22 over to a million dollars in monitoring the docket, spending
23 fifteen minutes a pleading; whether it's the plan or any other
24 motion, times the number of 13,000 motions. You're talking
25 about over a million dollars -- and you're smiling because the

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1 answer is no one spends a million dollars monitoring these
2 cases --

3 THE COURT: No, I know, but no one spends fifteen
4 minutes on every pleading, either. You know that that --

5 MS. SCHWEITZER: Take it in half, take it in a
6 quarter, take it in a eighth; tell me my rates are outrageous
7 at 500 dollars an hour. I'm fine with that, but you're telling
8 the clients, every one of these 11,000 transferees, that they
9 have to spend the time monitoring all 13,000 pleadings to make
10 sure there's no 'Gotcha' in there, to make sure the debtor is
11 not still holding on to a claim against them. Because it's not
12 only the 177 that survived, in the debtors' world --

13 THE COURT: Well, what --

14 MS. SCHWEITZER: -- it's all 11,000 people.

15 THE COURT: -- I guess what's missing here is the
16 ability to know whether any of these movants got actual notice.
17 I mean, I find it hard to believe that none of them was aware
18 of what was going on.

19 MS. SCHWEITZER: Well, I think there are different
20 levels of "aware of what was going on". I think there's a
21 level of 'I didn't know anything that was going on because I
22 didn't even know that Delphi was in bankruptcy.' Right? I
23 mean, there's that level.

24 THE COURT: Right.

25 MS. SCHWEITZER: There's 'I knew that Delphi was in

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1 bankruptcy but I didn't know about the statute of limitations'
2 or 'I did know and I didn't see this motion' or 'I didn't
3 understand this motion'. And then there are people who got the
4 motion in the mail, maybe, maybe not, but even people who got
5 the motion in the mail, did they really know that they were a
6 defendant? And I don't think the debtors have ever suggested
7 that they voluntarily told anyone. And I can certainly say for
8 my clients, it wasn't the typical case where you get the letter
9 in the mail warning you.

10 THE COURT: But it's the -- for me to dismiss all of
11 these complaints on this theory, it has to apply to that last
12 group, right? Someone that got it in the mail, maybe even put
13 two and two together and said, 'Oh, I may be at risk here.
14 Well, I'll just, you know, I'll let it go by.' Isn't it the
15 case that to dismiss these complaints, I have to -- on these
16 motions, I have to find that?

17 MS. SCHWEITZER: I think you have to find that the
18 debtors -- and, again, this is where it looks back to the due
19 process issues, is that the debtors' wholesale took a position
20 and created a strategy which whatever good intentions they had
21 when they first asked for it and whatever their intentions were
22 even in the spring of 2008, took you down the path where the
23 wholesale matter -- it's unfair to let these proceedings go
24 forward. And particularly when you see the complaints that are
25 at hand because this isn't over in terms of figuring out how

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1 we've been sued and what the notice is. When you look at the
2 sufficiency of the complaints --

3 THE COURT: Well, that's a separate issue. I
4 understand that issue. That's a separate issue.

5 MS. SCHWEITZER: I think it's a separate issue, but I
6 think that -- I mean, first, my answer would be yes. You can
7 take notice of the fact that there's a passage of time, that
8 there's been not only two things, a lack of notice -- a lack of
9 adequate notice, and not only a lack of notice but a concerted
10 effort to hide the complaints, coupled with the fact of the
11 passage of time and the things that have happened over that
12 time, the defendants didn't have an opportunity during this
13 time to use those complaints to their advantage, quite frankly.
14 That the -- whether to get information from the debtors before
15 the business were sold and, quite frankly, taking the debtors'
16 explanation at face value, 'We wanted to preserve business
17 relationships because we didn't want adverse consequences to
18 flow from the knowledge that these complaints existed.'

19 What did that mean? People could have said, 'I'm
20 doing business with you and I don't want to keep doing business
21 with you.' 'I'm doing business with you but I want these
22 claims settled, as a part of doing business with you.' 'I'm
23 not doing business with you, but I would happily trade away
24 some of these claims for doing business with you.' 'I got a
25 plan in the mail but you know what? Everything is going so

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1 smoothly with you, I'm going to say' --

2 THE COURT: But, again, isn't that on a case-by-case
3 basis? I mean, I -- as far as I can see, there's one case that
4 concludes that 4(m) relief was improperly granted and that case
5 wasn't on due process grounds. The Ninth Circuit just said,
6 'You know, we don't really set a standard for when it's
7 improperly granted, but it was improperly granted.' So, I
8 mean, it just seems to me that it's much more of a case-by-case
9 analysis, depending on the, you know, the harm that happened to
10 people.

11 MS. SCHWEITZER: Right. Well, I guess --

12 THE COURT: With the exception -- let me stop you.

13 MS. SCHWEITZER: Okay.

14 THE COURT: With the exception that under Rule
15 60(b)(4), if someone really didn't get notice of the extension
16 motions, then it would seem to me they should be able to argue
17 to me as if the motions were being made right now, although
18 I'll hear the debtors on that. But, that seems to be the way
19 to look at it.

20 MS. SCHWEITZER: Right. Well, Your Honor --

21 THE COURT: And then, the notice that would trigger
22 the Rule 60(b)(4) analysis would be due process notice and
23 consistent with not only Espinosa, but Mulane and the like.
24 It's true, if -- if the notice was buried or confusing or the
25 like, then I would understand that, too, as a violation of due

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1 Requiring for them to do all those things seems to me
2 to be the minimum of fairness --

3 THE COURT: Well, look, it's a motion for leave to
4 amend the complaint on unusual circumstances. It's really
5 their risk if I turn them down again, right? So --

6 MR. WINSTEN: My only point was that it should be
7 Iqbal plus, not Iqbal minus.

8 THE COURT: Well, I don't know what that means. And,
9 frankly, I think the Supreme Court's been pretty careful not to
10 turn Iqbal into a plus.

11 MR. WINSTEN: Right.

12 THE COURT: So --

13 MR. WINSTEN: But these are our --

14 THE COURT: But I think that the risk of being turned
15 down on the basis of the complaint still isn't good enough is a
16 serious enough -- the consequences of that are serious enough
17 so I assume that the plaintiffs are going to be pretty careful.

18 MR. WINSTEN: A suggestion when we get there is that
19 they ought to attach a draft --

20 THE COURT: Well, you have to do that.

21 MR. WINSTEN: Yes. So we know --

22 THE COURT: Yeah, absolutely.

23 MR. WINSTEN: -- what the form's going to be.

24 THE COURT: Got to do that.

25 MR. WINSTEN: Let me move to assumed contracts. This